

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES KENT,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,

Defendant.

Case No. 2:21-cv-00425-JAM-JDP (SS)

FINDINGS AND RECOMMENDATIONS  
THAT PLAINTIFF'S MOTIONS FOR  
ATTORNEY'S FEES UNDER THE EQUAL  
ACCESS TO JUSTICE ACT AND 42 U.S.C. §  
406(b) BE GRANTED

ECF Nos. 21 & 22

OBJECTIONS DUE WITHIN FOURTEEN  
DAYS

Plaintiff prevailed in this action after the parties stipulated to voluntary remand and entry of judgment under 42 U.S.C. § 405(g). *See* ECF Nos. 19 & 20. In July 2022, plaintiff filed a motion for an award of attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1). ECF No. 21. While that motion was pending, the Social Security Administration ("SSA") found plaintiff disabled and awarded him \$61,024 in past-due benefits. ECF No. 22-1. Plaintiff's counsel then filed a motion for an award of attorney fees under 42 U.S.C. § 406(b) equal to 25% of plaintiff's award of past-due benefits less the amount of any award under EAJA. ECF No. 22. Both fee motions are now before the court.

**A. Motion for Fees Under EAJA**

The EAJA provides that a prevailing party other than the United States shall be awarded fees and other expenses incurred by that party in any civil action brought by or against the United

1 States, “unless the court finds that the position of the United States was substantially justified or  
 2 that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). In determining  
 3 whether a fee is reasonable, the court considers the hours expended, the reasonable hourly rate,  
 4 and the results obtained. *See Comm’r, I.N.S. v. Jean*, 496 U.S. 154, 161-62 (1990); *Hensley v.*  
 5 *Eckerhart*, 461 U.S. 424, 433 (1983); *Atkins v. Apfel*, 154 F.3d 986, 987-88 (9th Cir. 1998).  
 6 “[E]xcessive, redundant, or otherwise unnecessary” hours should be excluded from a fee award,  
 7 and charges that are not properly billable to a client are not properly billable to the government.  
 8 *Hensley*, 461 U.S. at 434.

9 Plaintiff moves for attorney’s fees pursuant to the EAJA in the amount of \$6,961.28 based  
 10 on 32 hours of work performed by plaintiff’s counsel in 2021 and 2022 at the statutory-maximum  
 11 rate for 2021 of \$217.54. *See* ECF Nos. 21 & 21-1.<sup>1</sup> Plaintiff also seeks \$225.00 in costs, for a  
 12 total award of \$7,186.28. *Id.* Several months have elapsed since plaintiff filed his motion for  
 13 EAJA fees, and the Commissioner has not filed an opposition or a statement of non-opposition.  
 14 In light of the parties’ stipulation to remand and the Commissioner’s non-opposition to plaintiff’s  
 15 motion for EAJA fees, the Commissioner has failed to show that its position was substantially  
 16 justified. *See Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (the burden of  
 17 establishing substantial justification is on the government). The court has independently  
 18 reviewed the record and finds that both the hourly rate and hours expended are reasonable in light  
 19 of the results obtained.

20 **B. 42 U.S.C. § 406(b)**

21 Under 42 U.S.C. § 406(b)(1)(A), an attorney is entitled to reasonable fees for successfully  
 22 representing social security claimants in district court.

23 Whenever a court renders a judgment favorable to a claimant under  
 24 this subchapter who was represented before the court by an  
 25 attorney, the court may determine and allow as part of its judgment  
 26 a reasonable fee for such representation, not in excess of 25 percent  
 of the total of the past-due benefits to which the claimant is entitled

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27 <sup>1</sup> Although plaintiff’s counsel attests that he performed 35.4 total hours of work—  
 28 including 32.4 hours in 2022—he seeks fees for only 32.0 total hours of work at the 2021 hourly  
 rate. *See* ECF Nos. 21 at 1-2, 21-1 at 2-3.

1 by reason of such judgment.

2  
3 *Id.* Fees under section 406(b) are paid by the claimant from the awarded past-due benefits.  
4 *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*,  
5 535 U.S. 789, 802 (2002)). The 25% statutory maximum fee is not an automatic entitlement; the  
6 court must ensure that the requested fee is reasonable. *Gisbrecht*, 535 U.S. at 808-09 (“We hold  
7 that § 406(b) does not displace contingent-fee agreements within the statutory ceiling; instead,  
8 § 406(b) instructs courts to review for reasonableness fees yielded by those agreements.”). In  
9 assessing whether a fee is reasonable, the court should consider “the character of the  
10 representation and the results the representative achieved.” *Id.* at 808. A “court may properly  
11 reduce the fee for substandard performance, delay, or benefits that are not in proportion to the  
12 time spent on the case.” *Crawford*, 586 F.3d at 1151.

13 In *Gisbrecht*, the Supreme Court explained that “Congress harmonized fees payable by the  
14 Government under EAJA with fees payable under § 406(b) out of the claimant’s past-due Social  
15 Security benefits in this manner: Fee awards may be made under both prescriptions, but the  
16 claimant’s attorney must refund to the claimant the amount of the smaller fee.” 535 U.S. at 796  
17 (internal marks and citations omitted). “[A]n EAJA award offsets an award under [§] 406(b), so  
18 that the amount of the total past-due benefits the claimant actually receives will be increased by  
19 the EAJA award up to the point the claimant receives 100 percent of the past-due benefits.” *Id.*  
20 (internal marks and citations omitted).

21 Plaintiff entered a contingent fee agreement that provided he would pay counsel 25% of  
22 any award of past-due benefits. ECF No. 22-2. On remand, the SSA found plaintiff disabled and  
23 awarded him \$61,024 in past-due benefits, 25% of which is \$15,256. ECF No. 22-1 at 2. In  
24 recognition of the rule that an EAJA award offsets an award under § 406(b), *Gisbrecht*, 535 U.S.  
25 at 796, plaintiff’s counsel seeks only the difference between \$15,256 and the expected EAJA  
26 award of \$7,186.28—that is, \$8,294.72, ECF No. 22 at 2.<sup>2</sup>

27  
28 <sup>2</sup> Although courts may award fees separately under EAJA and § 406(b), and subsequently  
order counsel to refund the lesser figure, the Ninth Circuit has held that a court does not err in

1 The court finds that the requested fees and hourly rate are reasonable. As noted above,  
 2 counsel attests that he performed 35.4 total hours of work. ECF No. 22-3 at 2-3. Although the  
 3 net fee award of \$15,256 represents the statutory maximum of 25%, it would constitute an hourly  
 4 rate of only approximately \$431 for attorney services. Counsel attests that he has nearly 25 years  
 5 of experience as a disability attorney, and he typically charges a non-contingent hourly rate of  
 6 \$595. ECF No. 22 at 4. Counsel did not engage in dilatory conduct and his performance was not  
 7 substandard. Counsel's representation resulted in this matter being remanded for further  
 8 proceedings, which resulted in a favorable decision and an award of benefits. Given counsel's  
 9 experience, the result obtained, and the risk of loss in representing plaintiff, the court finds the  
 10 requested hourly rate reasonable. *See Crawford*, 586 F.3d at 1153 (Clifton, J., concurring in part)  
 11 (explaining that the majority opinion found effective hourly rates of \$519, \$875, and \$902 to be  
 12 reasonable); *see also De Vivo v. Berryhill*, No. 1:15-cv-1332-EPG, 2018 WL 4262007 (E.D. Cal.  
 13 Sept. 6, 2018) (awarding fees at effective hourly range of \$1,116); *Jamieson v. Astrue*, No. 1:09-  
 14 cv-0490-LJO-DLB, 2011 WL 587096 (E.D. Cal. Feb. 9, 2011) (finding fee at effective hourly  
 15 rate of \$1,169 reasonable).

16 Accordingly, it is hereby RECOMMENDED that:

- 17 1. Plaintiff's motion for attorney's fees under EAJA, ECF No. 21, be granted.
- 18 2. Plaintiff be awarded attorney's fees and costs in the amount of \$7,186.28 under the  
 19 EAJA.
- 20 3. Pursuant to *Astrue v. Ratliff*, 560 U.S. 586 (2010), any payment shall be made payable  
 21 to plaintiff and delivered to plaintiff's counsel, unless plaintiff does not owe a federal  
 22 debt. If the United States Department of the Treasury determines that plaintiff does  
 23 not owe a federal debt, the government shall accept plaintiff's assignment of EAJA  
 24 fees and pay fees directly to plaintiff's counsel.

25 taking the alternative approach of "reduc[ing] the fee award [under § 406(b)] by the amount of  
 26 attorneys' fees already paid by the government under the [EAJA]." *Crawford*, 586 F.3d at 1144  
 27 n.3; *see also Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1273 (11th Cir. 2010) ("Regardless  
 28 of whether the attorney writes a refund check to his client or deducts the amount of the EAJA  
 award from his § 406(b) fee request, the purpose of the Savings Provision is fulfilled—the  
 attorney does not get a double recovery.").

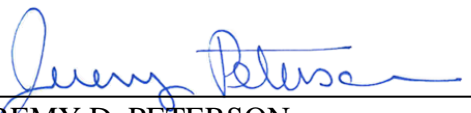
1 4. Plaintiff's counsel's motion for attorney's fees pursuant to 42 U.S.C. § 406(b), ECF  
2 No. 22, be granted.

3 5. Plaintiff's counsel be awarded attorney's fees in the amount of \$8,294.72 pursuant to  
4 42 U.S.C. § 406(b).

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
10 objections shall be served and filed within fourteen days after service of the objections. The  
11 parties are advised that failure to file objections within the specified time may waive the right to  
12 appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
13 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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15 IT IS SO ORDERED.

16 Dated: April 5, 2023

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18 JEREMY D. PETERSON  
19 UNITED STATES MAGISTRATE JUDGE  
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